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Please find below and/or attached an Office communication concerning this application or proceeding.



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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

Paper No. 28

Application Number: 09/527,019  
Filing Date: March 16, 2000  
Appellant(s): ELLIS, III

Kevin J. Dunleavy  
For Appellant

EXAMINER'S ANSWER

MAILED  
OCT 15 2003  
GROUP 3700

✓ This is in response to the appeal brief filed September 23,  
2003.

(1) *Real Party in Interest*

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A statement identifying the real party in interest is contained in the brief.

**(2) *Related Appeals and Interferences***

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

**(3) *Status of Claims***

The statement of the status of the claims contained in the brief is correct.

**(4) *Status of Amendments After Final***

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) *Summary of Invention***

The summary of invention contained in the brief is correct.

**(6) *Issues***

The appellant's statement of the issues in the brief is correct.

**(7) *Grouping of Claims***

Appellant's brief includes a statement that claims 11-44 do not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c) (7) and (c) (8).

**(8) *ClaimsAppealed***

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The copy of the appealed claims contained in the Appendix to the brief is correct.

**(9) Prior Art of Record**

5,425,186	Hoyt	06-1995
5,813,142	Demon	09-1998
6,023,857	Vizy et al.	02-2000
WO 97/46127	Adidas AG	12-1997

**(10) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

***Claim Rejections - 35 USC § 102***

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 11, 14-20, 22 and 25-31 are rejected under 35 U.S.C. 102(b) as being anticipated by the WO reference to Adidas AG WO 97/46127 (WO '127). WO '127 discloses all the limitations of the claims including the following: a removable midsole section 10 sized to fit inside and form part of the sole of a

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shoe; a secondary outer sole 14 on at least a portion of the outer surface of the removable midsole section to provide traction or wear resistance when the removable inner shoe is worn without the shoe (an overshoe) designed to receive and retain the insertable midsole section; a device (integral upper 16) associated with the removable midsole section for retaining the removable shoe on the user's foot when not placed within the shoe (overshoe) designed to receive and retain the midsole section; the removable shoe is insertable from the shoe (overshoe) in order to wear the inner shoe independently of the shoe; upper surface of removable midsole section provides the orthotic effect (.e. supports or supplements weakened or abnormal joints by providing cushioning for those joints) and provides less than half the thickness of the sole of the removable midsole section; a removable midsole section 10 sized to fit inside a shoe (fits into an overshoe that has a sole and an upper that fits around the upper of the removable shoe); the removable midsole including an inner surface (that area where one places one's foot upon); an outer surface (that which is the outsole 14); the midsole having a medial and a lateral side (see Figure 22); a plurality of protrusions (62, 64, 66) on at least one side of the midsole that interacts with the shoe to retain the midsole within the shoe )these portions will be tightly

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fitted into the overshoe with the elasticity of the overshoe applied to these portions and holding the overshoe on the shoe); each of said protrusions having an outer surface formed by the midsole and sufficiently sized to interact with the shoe to retain the removable midsole section in the shoe (see Figure 21, 22); at least one portion of the outer surface of each protrusion is concavely rounded (see Figure 22) relative to an inner section of the removable midsole directly adjacent to the concavely rounded portion (protrusions are rounded inwardly); at least one portion of an inner surface of a side of the removable midsole section is convexly rounded relative to a section of the removable midsole directly adjacent to the convexly rounded inner surface portion (see Figure 22, the protrusion has an outwardly rounded protrusion that has an inner surface that is convex and the outer surface that is concave); the midsole is insertable from the shoe (all shoes are removable from overshoes, thereby the definition of an overshoe); protrusions are located on either side of the midsole (see Figure 19); the protrusions are located in an area near the longitudinal arch (see Figure 22); the midsole tapers on both sides of the protrusion (see Figure 22, tapering occurs between each protrusion); tapered portion can be considered an indentation as 62, 64 and 66 are considered protrusions, depending on one's

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perspective or reference point); concavely rounded portions of midsole form protrusions (see Figure 22); the outer surface of the protrusions on the outer sole (62, 64 and 66) is concavely rounded to an inner section of the bottom sole adjacent to the concavely rounded section of the bottom sole; inner surface of the protrusions of the bottom sole also similar to the inner surface of the protrusions of the midsole described above; protrusions of bottom sole located on either side of shoe (to fit protrusions of midsole shown in Figure 19); thickness of protrusions of bottom sole taper in similar fashion to that of protrusions of midsole (see Figure 20).

3. Claims 39-44 are rejected under 35 U.S.C. 102(b) as being anticipated by the WO reference to Adidas AG (WO '127). WO '127 discloses all the limitations of the claims including the following: a shoe upper 16, a shoe sole 14 including at least a bottom sole (bottom sole includes 14 and the lower sections of 16); at least a portion of the side of the shoe upper being directly attached to the bottom sole so the upper abuts a portion of the outer surface of the removable midsole orthotic (see Figure 22); the removable midsole orthotic is insertable from the shoe and insertable into the shoe from an opening in the upper (see Figure 22); at least two recesses in the bottom sole (those formed by the inside of 62, 64 and 66) to thereby

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releasably retain the removable midsole orthotic; the outer surface of the bottom sole has a plurality of protrusion (62, 64, 66); at least one portion of the outer surface of each protrusion on the bottom sole is concavely rounded to an inner section of the bottom sole directly adjacent the concavely rounded outer surface portion (see inside medial arch area of bottom sole); at least one portion of an inner surface of a side of said protrusions of the bottom sole convexly rounded relative to a section of the bottom sole directly adjacent the convexly rounded inner surface portion; one protrusion is located on the lateral side of the bottom sole and another on the medial side (see figure 20); each protrusion is located at a location on the bottom sole which corresponds to at least one of the base of a calcaneus, a lateral tuberosity of the calcaneus, a head of a first distal phalange, a longitudinal arch, a head of a first metatarsal, a head of a fifth metatarsal, and a base of the fifth metatarsal; the bottom sole tapers from a greater thickness to a lesser thickness from the protrusion to a location on one side of the protrusion (see figure 20, goes from thicker area at protrusion to a thinned area between protrusions on both sides of the protrusion.)

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4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

5. Claims 32-38 are rejected under 35 U.S.C. 103(a) as being unpatentable over WO '127 as applied to claim 25 above in view of Hoyt 5,425,186. WO '127 discloses all the limitations of the claims except the outer shoe upper and sole. Hoyt '186 teaches that a shoe can be covered by an overshoe which consists of a shoe upper 32 and sole 12, 14. This overshoe can be placed over a shoe to protect it from wear and tear as well as inclement weather. Therefore, it would have been obvious, to one of ordinary skill in the art at the time the invention was made, to place the shoe of WO '127 in the overshoe of Hoyt '186 to protect the shoe from excessive wear and tear as well as inclement weather. With respect to claim 33, Hoyt '186 clearly shows a portion of side of shoe upper 32 attached directly to the bottom sole 12, 14. With respect to claims 33-34, the shoe upper 32 would abut at least a portion of the outer surface of the midsole (after midsole is placed within the overshoe).

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6. Claims 12 and 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over WO '127 as applied to claim 11 above in view of Demon 5,813,142. WO '127 discloses all the limitations of the claims except for the compartment containing a fluid, a flow regulator, a duct, a control system that automatically adjusts the pressure in the compartment, and a microcomputer. Demon '142 teaches that a shoe sole can be modified to contain a compartment containing a fluid, a flow regulator, a duct, a control system automatically adjusting the pressure in the compartment, and a microcomputer, substantially as claimed. The computer control can be located in an upper portion (as taught by Demon '142) of the removable midsole. Therefore, it would have been obvious to provide the shoe midsole of WO '127 with the system of Demon '142, located in the upper portion of the midsole of WO '127, to reduce the impact of the user's foot on the traveling surface during use.

7. Claim 21 is rejected under 35 U.S.C. 103(a) as being unpatentable over WO '127 as applied to claim 11 above in view of Vizy et al. 6,023,857. WO '127 discloses all the limitations as claimed except for an insole located within the midsole orthotic shoe. Vizy et al. '857 teaches in column 1, lines 6-28 that it is typical in a shoe to include an insole to aid in comforting the user's foot. Therefore, it would have been

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obvious, in view of Vizy et al. '857, to place an insole on top of the midsole of the WO '127 reference to aid in giving comfort to the user's foot during wear.

8. Claims 25 and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over WO '127 as applied to claim 11 above in view of Hoyt 5,425,186. The WO '127 reference as applied to claim 11 above discloses all the limitations of the claims except for the shoe upper and shoe sole. Hoyt '186 teaches that a shoe can be covered by an overshoe which consists of a shoe upper 32 and sole 12, 14. This overshoe can be placed over a shoe to protect it from wear and tear as well as inclement weather. Therefore, it would have been obvious, to one of ordinary skill in the art at the time the invention was made, to place the shoe of WO '127 in the overshoe of Hoyt '186 to protect the shoe from excessive wear and tear as well as inclement weather.

***Double Patenting***

9. Claims 11-44 of this application conflict with claims 11-45 of Application No. 09/558,629. 37 CFR 1.78(b) provides that when two or more applications filed by the same applicant contain conflicting claims, elimination of such claims from all but one application may be required in the absence of good and

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sufficient reason for their retention during pendency in more than one application. Applicant is required to either cancel the conflicting claims from all but one application or maintain a clear line of demarcation between the applications. See MPEP § 822.

10. A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

11. Claims 11-44 are provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 11-45 of copending Application No. 09/558,629. This is a provisional double patenting rejection since the conflicting claims have not in fact been patented and since it has been determined that there appears to be no difference between the terms "removable" and "insertable" as they are determined to be interchangeable.

12. Claims 11-44 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting

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as being unpatentable over claims 11-45 of copending Application No. 09/588,629. Although the conflicting claims are not identical, they are not patentably distinct from each other because the terms "insertable" and "removable" are interchangeable. Since something that can be inserted can be removed and alternately something that has been removed can be replaced where it has been removed from, i.e. inserted, there appears to be no difference in the claimed subject matter.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

**(11) Response to Argument**

Firstly, for ease of understanding the examiner's position, the response to appellant's arguments in the Final Office action will be repeated below. For the purposes of ease of following the response to appellant's arguments, the following responses will be numbered the same as that of appellant's arguments.

Response to Arguments From Final Office Action

Applicant's arguments filed January 27, 2003 have been fully considered but they are not persuasive. Applicant argues that the midsole of WO '612 (Adidas AG) is not removable and notes passages from the reference. The adhesive noted by WO '612 in the passages cited is optional and therefore not required, i.e.

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not necessary. Also, the stitches that applicant is referring to can be cut to remove the sole, thereby allowing the sole to be removable. The removability claimed is broad enough to encompass the cutting of stitches to remove the sole.

Therefore, the outsole is not permanently attached to the upper nor is the midsole permanently affixed to the outsole. The cutting of the stitches would not render the shoe irreversibly damaged as other stitches can be applied. Since applicant is claiming that his removable midsole can be "releasably attached", the stitches of WO '612 would meet the releasability of the attachment by cutting. Applicant's argument that WO '612 does not show that its shoe can be placed within an overshoe and therefore the reading of the shoe of WO '612 as being the removable midsole when placed in an overshoe is not clearly understood. Overshoes are made to fit over shoes and protect them from the elements as well as any other harm that may come to the shoe during use. Therefore, the shoe of WO '612 can be placed within an overshoe when going, for instance, outside on a rainy day, to protect the shoe from the rain water and then removed from the overshoe when going inside, such as a business or gym. Since overshoes are "designed to receive and retain" shoes within them, the combination of the shoe of WO '612 placed within an overshoe meets the limitations of the claims. With

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respect to applicant's argument that the WO' 612 reference does not explicitly show that the protrusion located on the shoe interact with an overshoe to aid in holding the overshoe on the shoe of WO '612, this argument is not clearly understood. The reasons for combinations of references can also come from the knowledge of one of ordinary skill in the art. With this in mind, if one of ordinary skill in the art placed an overshoe, such as that shown in Hoyt, over the shoe of WO '612, the most outwardly portions of the shoe of WO '612, in this instance the protrusion(s) of the shoe of '612, would be that which contacts the inner side of the upper of the overshoe and aids in holding the overshoe onto the shoe. It is well known to those using overshoes that the frictional fit between the outermost point of the shoe and the innermost point of the overshoe help to hold the overshoe on the user's shoe. As the overshoe of Hoyt is stretched, the sides of the upper of the overshoe more tightly fit and take on the shape of the shoe in which they are being stretched around, thereby allowing the protrusions of the shoe of WO '612 to aid in holding the overshoe onto the shoe. With respect to applicant's argument that the outer surface of the protrusions of the removable midsole section is formed by midsole and this is not shown in the combination of WO '612 and Hoyt, this argument is not clearly understood. Clearly, in this

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instance where the shoe of WO '612 is the inner shoe and the overshoe of Hoyt is the outer shoe, the protrusions of the shoe of WO '612 would be a midsole as the sole of the overshoe of Hoyt would be the outer sole. With respect to applicant's argument that the midsole of the combination of WO '612 and Hoyt would not abut the upper, this argument is not clearly understood. When the shoe of WO '612 is placed within the overshoe of Hoyt, the outsole of the shoe of WO '612 becomes the midsole. Therefore, when the shoe of WO '612 is placed within the upper of Hoyt, the outsole of the shoe of WO '612 abuts the upper of the overshoe of Hoyt, thereby meeting the limitations of the claims. With respect to applicant's argument that the controller in Demon is not located in the same place as that of applicant's claimed invention, it appears applicant is arguing more than that which is claimed. The claims only require that the controller be located in the inner shoe (see applicant's own argument on page 17, paragraph 2 of the amendment filed January 27, 2003). Therefore, since the controller of Demon is located within the shoe upper, since within the shoe upper is within the shoe, Demon meets this limitation in the claims. Applicant's arguments with respect to the difficulty of making the system of Demon work in the claimed combination are not clearly understood. Applicant has admitted that it can be done,

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although it may be difficult and more costly, and therefore, since all that is required is that the combination can be made, the limitations of the claims are met by this combination.

VIII.

Issue 1:

Group I-Claims 11,14-20 and 22

Appellant reiterates his position that the midsole of WO '612 is not removable and therefore WO '612 does not meet the claimed limitations. For response to this argument see the Response to Arguments From Final Office Action above. Appellant further argues that the affixing of the midsole to the sole shows that the midsole is not removable. It appears that the appellant is arguing more than that which is claimed. The claims do not require that the midsole be removable *during use of the outer shoe/inner shoe combination*. The only requirements of the claims is that the midsole is removable, which, in the case of WO '612, the midsole is removable even thought it may take some work to remove it. Also, applicant argues that the midsole of WO '612 is *permanently affixed* to the outsole. There is no notation in WO '612 that states that the midsole and outsole are *permanently affixed* to one another. Appellant further argues that the midsole of WO '612 is not releasably attached to the outsole and that its attachment is different than the use of

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releasable attachment as described in the present specification.

Appellant has described in the specification only that the midsole is attached through releasable attachment means. The drawings submitted have failed to aid in teaching what appellant means to encompass by releasable attachment means and therefore, since stitching, mechanical fasteners, can be cut and restitched, this can be considered releasable attachment means in the broadest reasonable interpretation of the terms.

Group V-Claims 25-31

Appellant argues the same argument here as in Group I above with respect to WO '612. For response to this argument, see VIII.

Group I response above.

Group III-Claims 39-44

Appellant reiterates the same argument with respect to WO '612 as noted in Group I above with respect to the removability of the midsole. See Group I above for response to this argument.

Issue 2:

Group V-Claims 25-26

Appellant argues that (1) the plurality of protrusions on at least one side of the removable midsole section that are sized to interact with the shoe to retain the removable midsole section in the shoe, and (2) that the outer surface of each of the plurality of protrusions must be formed by midsole. This

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was explained in the Response to Arguments above. Please see above for response, especially with respect to the explanation of how the WO '612 reference is the midsole and the Hoyt reference is the outsole with upper and how overshoes are made specifically to stretch over other shoe to protect them from the elements. The protrusions on at least one side of the removable midsole would be the protrusions 74, 76, 78 of WO '612 and the outer surface of each of these protrusions are formed by the midsole, the shoe of WO '612. Therefore, the elements that appellant notes as being missing from the combination are clearly shown in WO '612.

Group VI-Claim 32

Appellant's argument is that none of the reference teaches the use of the shoe of WO '612 in an overshoe and two limitations are missing from WO '612. Since this argument has been answered in Group V above as well as in the Response to Arguments From Final Office Action above, please see these areas for response to these arguments. Appellant further argues that the placement of the shoe of WO '612 in the overshoe of Hoyt does not make the outer sole of WO '612 a midsole with respect to this combination. When any shoe is placed within the upper and outer sole of the overshoe of Hoyt, no matter what the sole was called in the separate reference, the outer sole of the inserted shoe

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would no longer be considered the "outer sole" since it is now placed within the upper and outer sole of the over shoe. Since this outer sole of WO '612 is not the "outer sole" of the combination and there is a sole that is within the upper of the shoe of WO '612, thereby making this the inner sole, the outer sole of the shoe of WO '612 when placed within the outer sole and upper of the overshoe must therefore be the midsole, that sole located between the outer sole of the overshoe and the insole of the inner shoe.

Group VII-Claims 33-38

Appellant reiterates the argument in Group V above. See Group V response above for response to this argument. Furthermore, appellant argues that the limitation that at least two protrusions on the side of the removable midsole section are in abutting relationship with the bottom sole when the removable midsole section is inside the shoe is not taught by the references applied. This argument is not clearly understood. As appellant notes with respect to the examiner's previous response to this argument, when the shoe of WO '612 is placed into the upper of the overshoe of Hoyt, since the sole of Hoyt does not have a cavity for the sole of the shoe of WO '612 to be placed in, the sole of the shoe of WO '612 would then abut, on the inside, the upper of the overshoe of Hoyt as this upper

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covers the sole of WO '612, thereby meeting this limitation in the claims. Appellant further argues that the outer sole of WO '612 cannot be both the midsole and the bottom sole. This argument is also not clearly understood. The outer sole of Hoyt is considered the "outer sole" whereas the outer sole of WO '612 can be considered the "bottom sole" but not the "outer sole". Since appellant has claimed only a bottom sole and not a bottom most or outer most sole, the combination would meet this limitation in the claims.

Issue 3:

Group II-Claims 12-13

Appellant reiterates his argument with respect to WO '612. Appellant further argues that the controller of Demon is located within the upper of the shoe and since it is located within the upper of the shoe and the upper of Demon is clearly not removable from the shoe, then it cannot form part of the inner shoe as claimed in claims 12-13. This argument is not clearly understood. Demon teaches that the controller can be located within the upper of the shoe. Since WO '612 contains an upper, it follows that the controller of Demon can be placed within the upper of WO '612, as noted in the rejection for the same purposes. Appellant further argues that locating the controller in the upper would expose the controller to torsion created by

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the wearer during use. This argument is not clearly understood. The only requirement by the claims is that the controller be located within the upper, which is clearly taught by Demon. Appellant further argues that the controller of Demon would be required to work in two different platforms, with the shoe of WO '612 inserted into the shoe of Hoyt and with the WO '612 shoe used separately. With the controller of Demon located within the upper of the shoe of WO '612, the controller would work equally as well when the shoe of WO '612 is used alone or when placed within the overshoe of Hoyt to protect it from inclement weather. Appellant argues that certain features of Demon would teach away from combining the shoe of the combination of WO '612 with the teachings of Demon. Appellant argues that the system of Demon is spread out in the sole and upper of the shoe and therefore making the construction of the WO '612 impractical because it would be difficult to provide the connection between the upper and the midsole portion of WO '612. This argument is not clearly understood, although it may be difficult, the combination can be done as noted by appellant and would be done for the reasons given for the combination of Demon with WO '612 as noted in the rejections above. Therefore, this combination would meet the limitations of the claims.

Issue 4:

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Group III-Claim 21

Appellant argues that Vizy does not teach that which is missing from WO '612. Since it is believed that WO '612 is not missing that which appellant believes it to be missing, as noted in many of the sections above, this combination is believed to properly anticipate the claimed subject matter.

Issue 5:

The 35 U.S.C. 101 Double Patenting Rejection

Appellant's main argument is that the term "orthotic" would make the two applications, the instant application and application 09/588,629, separately patentable since "orthotic" has a specific meaning which results in a structural difference between the two applications. This argument is not clearly understood. Any cushion or material that is placed within a shoe can be considered "orthotic" in that it would be giving particular support to those areas of the foot which it is supporting. Therefore, since taken in its broadest reasonable interpretation, the term "orthotic" can be applied to any material that is placed within the shoe that gives support to different parts of the foot, the midsole each of the applications can be determined to be "orthotic" by definition. Therefore, the addition of the term "orthotic" in the 09/588,629

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application fails to maintain a clear line of demarcation between the two applications. Furthermore, a Statutory Double Patenting rejection does not require that the claims be "identical" but that they are directed to the same invention and the claims have the same "gist". For example, if the only difference between claims are that one claims "removable" while another claims "insertable", since the two terms are substantially interchangeable, the claims would meet the conditions of a Statutory Double Patenting.

Issue 6:

Obvious Type Double Patenting

See Final rejection.

For the above reasons, it is believed that the rejections should be sustained.

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Respectfully submitted,

  
Anthony D Stashick

Primary Examiner

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ADS

October 14, 2003

Conferees



Mickey Yu  
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